TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 37.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

LEANDER W. BARBITT, CLAIBORNE HALL, AND JACKSON A. BURNETT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

FILED AUGUST 24, 1875.

SUPREME COURT OF THE UNITED STATES.

No. 97.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

LYSANDER W. BABBITT, CLAIBORNE HALL, AND JACKSON A. BURNETT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

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1 United States circuit court, district of Iowa.

THE UNITED STATES
vs.
LYSANDER W. BABBITT AND OTHERS. } No. 183. Law.

TRANSCRIPT.

2 Pleas in the circuit court of the United States of America for the district of Iowa, at a term thereof begun and holden at the United States court-room in the city of Des Moines, in the State of Iowa and district aforesaid, on the second Monday of October, the same being the 12th day of October, A. D. 1874, before the Hon. John F. Dillon, United States circuit judge for the eighth circuit, and Hon. James M. Love, United States district judge for said district of Iowa.

3 Be it remembered that heretofore, to wit, on the 24th day of October, A. D. 1874, there was filed in the clerk's office of the circuit court of the United States for the district of Iowa a præcipe for writ of error in a certain cause, wherein the United States is plaintiff, and Lysander W. Babbitt and others are defendants; which said præcipe is in the words and figures following, to wit:

4 In U. S. circuit court, dist. of Iowa, October term, 1874, at Des Moines.

UNITED STATES OF AMERICA
vs.
LYSANDER W. BABBITT AND OTHERS.

To the clerk of said court:

You will please issue writ of error to said court in said case, upon the division of said court, as shown by its certificate.

October 24th, 1874.

JAMES T. LANE,
U. S. Dist. Att'y Dist. of Iowa,
By LEE R. SEATON, *his Dep't.*

(Endorsed:) U. S. v. Lysander W. Babbitt et al. Filed Oct. 24th. 1874. George B. Corkhill, clerk.

5 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in said circuit court, before you, between the United States of America and Lysander W. Babbitt, Claiborne Hall, & Jackson A. Burnett, a manifest error hath happened, to the great damage of the said United States, as by its complaint appears, and we, being willing that the error, if any there hath been, should be duly corrected and full and speedy justice d'ne to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the
6 same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the Supreme Court may cause

further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this 29th day of October, A. D. 1874, and of the Independence of the United States 99th.

[SEAL.] GEORGE B. CORKHILL,
Clerk U. S. Circ't Court, Dist. of Iowa.

Allowed.

JOHN F. DILLON,
Judge.

(Indorsed:) The United States vs. L. W. Babbitt et al. Writ of error. Filed Oct. 29th, 1874. George B. Corkhill, clerk.

7 In obedience to the foregoing writ of error, I, George B. Corkhill, clerk of the circuit court of the United States for the district of Iowa, do hereby certify and return that hereto annexed are full, true, and complete copies of the judgment entry and certificate of division of opinion of the judges in a certain cause, wherein the United States is plaintiff and Lysander W. Babbit and others are defendants, as full, true, and complete as the originals of the same now remain on file and of record in my office.

I further certify and return that the original citation, with return of service endorsed thereon, is hereto attached.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at my office in Des Moines, in said district, this the 17th day of March, A. D. 1875.

[SEAL.] GEORGE B. CORKHILL,
Clerk U. S. Circ't Court, Dest. Iowa.

8 United States circuit court, district of Iowa, October term, 1874.

FRIDAY, *October* 16, 1874.

THE UNITED STATES
vs.
LYSANDER BABBITT ET AL. } No. 183. Law.

This cause came on this day for hearing upon the plaintiff's demurrer to the third count of the answer of the sureties on the bond sued on herein, and the plaintiff's demurrer to the answer of defendant Babbitt this day filed herein, plaintiff appearing by the district att'y, Ja's T. Lane, esq., and the defendants by E. J. Goode, esq., and after argument of counsel thereon the court, being fully advised, ordered that the said demurrers be, and the same are hereby, overruled; and the plaintiff refusing to further plead, and electing to stand on the said demurrer, it is ordered and adjudged that the plaintiff take nothing by its
9 petition, and that the defendants go hence without day. And it is ordered that it be certified to the Supreme Court of the United States that the judges to whom the said demurrers were submitted differed in opinion on the questions raised by the said demurrers, as stated in the certificate of division of opinion filed herein, signed by the judges.

9½ UNITED STATES OF AMERICA,
District of Iowa:

At a circuit court of the United States, begun and held at Des Moines, for the district of Iowa, on Monday, the twelfth day of October, in the year of our Lord one thousand eight hundred and seventy-four, and in the ninety-eighth year of American Independence—

Present: Honorable John F. Dillon and James M. Love, esquires.

UNITED STATES OF AMERICA
vs.
LYSANDER W. BABBITT, CLAIBORNE HALL, & Jackson A. Burnett.

State of the pleadings.

This is an action of debt upon a bond given by the defendants to the plaintiff, on the ninth day of May, A. D. 1853, in the sum of ten thousand dollars, containing the following conditions, namely:

"Whereas the President of the United States hath, pursuant to law, appointed the said Lysander W. Babbitt register of the land-office
10 for the district of land subject to sell at Kanesville, in the State of Iowa, for the term of four years from the sixth day of April, 1853, by commission dated the eighth day of April, 1853:

"Now, therefore, if the said Lysander W. Babbitt has truly & faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge, all the duties of the said office, according to law, then the above obligation to be void and of none effect, otherwise it shall abide and remain in full force and virtue."

To recover the sum of ten thousand dollars alleged to have been charged and recovered by the said Lysander W. Babbitt as such register, and by virtue of his said office, during his said term of office, as fees for the location of military bounty-land warrants under the provisions of the acts of Congress approved the eleventh of February, 1847, the 25th of September, 1850, 22 day of March, 1852, and the 3d day of March, 1855, over and above the maximum compensation of $3,000 which he, as such register, is authorized to retain.

The defendants Claiborne Hall and Jackson A. Burnett, as the
11 sureties for the said Lysander W. Babbitt, among other pleas, pleaded separately for themselves that it was no part of the official duties of the said Lysander W. Babbitt, as such register, to receive the said fees for locating military bounty-land warrants at the land-office at said Kanesville, and that he was not required as such register by the obligations of said bond to pay the same to the United States.

The defendant Lysander W. Babbitt, for himself alone, among other pleas, pleaded the same defense above stated as having been pleaded by the sureties.

To each of these several pleas by the principal and his sureties the plaintiff demurred, and the defendants joined in the demur'er.

This case coming on to be argued at this term, the court overruled said demur'er, and final judgment was entered in favor of said defendants, both principal and sureties, that they go hence without day.

On the hearing of the said demurrer and in the rendition of said judgment thereon, the following questions occur'ed, on which the opinion of the judges were opposed:
12 1st. Whether it was one of the duties pertaining to the office of the defendant Babbitt, as register of the land-office, to charge and receive from the locators of warrants the register-fees prescribed to be paid by the holders of military bounty-land warrants, on the location thereof on the public lands subject to private entry by such warrants, under the said acts of Congress, approved February 11th, 1847, September 28th, 1850, March 22nd, 1852, and March 3rd, 1855.

2nd. Whether, if such fees were charged and received by the said Babbitt as such register from such locators of warrants, his neglect upon demand to account for and pay to the United States the surplus thereof, over and above the maximum compensation authorized by him

to be received, as determined in this case by the Supreme Court of the United States, in its decision in 1st Black, 55, constitutes a breach of the conditions of the said official bond of said Babbitt, as register, as respects himself alone, and also as respects the sureties on said bond, & whether in such case the remedy is not an action on the case or for money had & received.

13 Whereupon, on a motion of the plaintiff, by his counsel, that the points on which the disagreement hath happened may, during the term, be stated, under the direction of the judges, be certified under the seal of the court to the Supreme Court to be finally decided, it is ordered that the foregoing state of the pleading and the points of disagreement, which is made under the direction of the judges, be certified according to the request of the plaintiff, by his counsel, and the law in that case made and provided.

(S'g'd) JOHN F. DILLON.
J. M. LOVE.

(Endorsed:) Filed Oct. 19, 1874. George B. Corkhill, clerk.

14 UNITED STATES OF AMERICA, *ss:*

To Lysander W. Babbitt, Claiborne Hall, & Jackson A. Burnatt, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden on the second Monday in October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of Iowa, wherein the United States of America is plaintiff and Lysander W. Babbitt, Claiborne Hall, Jackson A. Burnatt are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable John F. Dillon, judge of the said circuit court of the United States, this 29 day of October, in the year of our Lord 1874.

JOHN F. DILLON,
Judge.

15 This writ came into my hands on the 30th day of October, A. D. 1874, and on the 2nd day of Nov., 1874, I served it on the def'ts named within by leaving a copy of it with E. J. Goode, the att'y for said def'ts, he waiving the reading of it.

And on the 6th day of Nov., 1874, I left a copy of it with J. S. Polk, of the firm of Polk & Hubbell, former att'ys for said def'ts, he waiving reading and alleging that his firm were no longer att'ys for def'ts.

PETER MELENDY, *U. S. Marshal,*
By S. S. ETHRIDGE, *Deputy.*

Fees, $4.00.

(Indorsed:) The United States vs. Lysander W. Babbitt et al. Citation.

(Indorsement on cover:) No. 97. The United States, plaintiff in error, vs. Lysander W. Babbitt, Claiborne Hall, and Jackson A. Burnett. Iowa C. C. U. S. Filed 24th August, 1875.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

THE UNITED STATES, PLAINTIFFS IN ERROR,
vs.
LYSANDER W. BABBITT AND OTHERS. } No. 97.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is an action of debt upon a bond given by the defendants to the plaintiff, on the ninth day of May, A. D. 1853, in the sum of ten thousand dollars, containing the following conditions, namely:

"Whereas, the President of the United States hath, pursuant to law, appointed the said Lysander W. Babbitt register of the land-office for the district of land subject to sale at Kanesville, in the State of Iowa, for the term of four years from the sixth day of April, 1853, by commission dated the eighth day of April, 1853:

"Now, therefore, if the said Lysander W. Babbitt

has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge, all the duties of the said office according to law, then the above obligation to be void and of none effect, otherwise it shall abide and remain in full force and virtue."

To recover the sum of ten thousand dollars alleged to have been charged and received by the said Lysander W. Babbitt as such register, and by virtue of his said office, during his said term of office, as fees for the location of military bounty-land warrants under the provisions of the acts of Congress approved the eleventh of February, 1847, the 25th of September, 1850, twenty-second day of March, 1852, and the third day of March, 1855, over and above the maximum compensation of $3,000 which he, as such register, is authorized to retain.

The defendants Claiborne Hall and Jackson A. Burnett, as the sureties for the said Lysander W. Babbitt, among other pleas, pleaded separately for themselves that it was no part of the official duties of the said Lysander W. Babbitt, as such register, to receive the said fees for locating military bounty-land warrants at the land-office at said Kanesville, and that he was not required as such register by the obligations of said bond to pay the same to the United States.

The defendant Lysander W. Babbitt, for himself alone, among other pleas, pleaded the same defense above stated as having been pleaded by the sureties.

To each of these several pleas by the principal and his sureties the plaintiff demurred, and the defendants joined in the demurrer.

This case coming on to be argued at this term, the

court overruled said demurrer, and final judgment was entered in favor of said defendants, both principal and sureties, that they go hence without day.

On the hearing of the said demurrer and in the rendition of said judgment thereon, the following questions occurred, on which the opinions of the judges were opposed:

1st. Whether it was one of the duties pertaining to the office of the defendant Babbitt, as register of the land-office, to charge and receive from the locators of warrants the register-fees prescribed to be paid by the holders of military bounty-land warrants, on the location thereof on the public lands subject to private entry by such warrants, under the said acts of Congress, approved February 11, 1847, September 28, 1850, March 22, 1852, and March 3, 1855.

2d. Whether, if such fees were charged and received by the said Babbitt as such register from such locators of warrants, his neglect upon demand to account for and pay to the United States the surplus thereof, over and above the maximum compensation authorized by him to be received, as determined in this case by the Supreme Court of the United States, in its decision in 1 Black, 55, constitutes a breach of the conditions of the said official bond of said Babbitt, as register, as respects himself alone, and also as respects the sureties on said bond, and whether in such case the remedy is not an action on the case or for money had and received.

Whereupon, on a motion of the plaintiff, by his counsel, that the points on which the disagreement hath happened may, during the term, be stated, under the direction of the judges, be certified under the seal of the court to the Supreme Court to be finally decided, it is

ordered that the foregoing state of the pleading and the points of disagreement, which is made under the direction of the judges, be certified according to the request of the plaintiff, by his counsel, and the law in that case made and provided. (Record, 3, 4.)

ASSIGNMENT OF ERRORS.

The plaintiffs in error assign for error the aforesaid final judgment of the circuit court in favor of the defendants, and that they go hence of this action without day, whereby their said pleas were sustained and the plaintiff's demurrer thereto was overruled; whereas the plaintiffs say that their demurrer should have been sustained and the defendants ordered to answer further, or, in default thereof, that judgment go against them for want of a sufficient plea. (Record 2; folios 8 and 9.)

STATUTES.

From the report of the previous action of this court in this case, found in 1 Black, 57 to 60, the statutes supposed to affect Mr. Babbitt's right to receive or retain the fees he collected are the following, quoted in the language of Mr. Justice Swayne's opinion:

"The act of April 20, 1818, (3 Stat., 466,) provides: That, instead of the compensation now allowed by law to the registers of the land-offices, they shall receive an annual salary of five hundred dollars each, and a commission of one per centum upon all moneys expressed in the receipts by them filed and entered, and of which they shall have transmitted an account to the Secretary of the Treasury: *Provided*, That the whole amount which any register of the land-offices shall receive

under the provisions of this act shall not exceed, for any one year, the sum of three thousand dollars."

The act of February 11, 1847, (9 Stat., 125,) gave to certain non-commissioned officers, musicians, and privates in the Mexican war, each one hundred and sixty acres of land. This act makes no provision for fees.

The act of May 17, 1848, (9 Stat., 231,) authorized registers and receivers to receive from the holders of warrants the fees therein specified for their services in carrying out the provisions of the act of 1847, with a proviso that where the warrant was located for the use of the volunteer to whom it was issued, no compensation should be charged either by the register or receiver.

The act of September 28, 1850, (9 Stat., 520,) authorized the issuing of bounty-land warrants to the soldiers who performed military service in the war of 1812, or in any of the Indian wars since 1790, and to the commissioned officers of the Mexican war. This act made no provision for fees; but, on the contrary, directed the locations to be made "free of expense."

The act of March 22, 1852, (10 Stat., 4,) extends the benefits of the act of 1850 to all cases where the militia or volunteers of any State or Territory were called into military service and paid by the United States subsequent to the 18th of June, 1812.

The second and third sections of that act are as follows:

"SEC. 2. That the registers and receivers of the land offices shall hereafter be severally authorized to charge and receive for their services, in locating all military bounty-land warrants issued since the 11th day of February, 1847, the same compensation or percentage to which they are entitled by law for sales of public lands for cash, at the rate of $1.25 per acre, the said

compensation to be hereafter paid by the assignees or holders of such warrants.

"SEC. 3. That registers and receivers, whether in or out of office at the passage of this act, or their legal representatives in case of death, shall be entitled to receive from the Treasury of the United States, for services heretofore performed in locating military bounty-land warrants, the same rate of compensation provided in the preceding section for services hereafter to be performed, after deducting the amount already received by such officers under the act entitled 'An act to require the holders of military land-warrants to compensate the land officers,' &c., approved May 17, 1848: *Provided*, That no register or receiver shall receive any compensation out of the Treasury for past services, who has charged and received illegal fees for the location of such warrants: *And provided further*, That no register or receiver shall receive for his services, during any year, a greater compensation than the maximum now allowed by law."

The appropriation act of March 3, 1853, (10 Stat., 204,) contains at its close the following proviso:

"That whenever the amount received at any United States land-office, under the third section of an act entitled 'An act to make land-warrants assignable, and for other purposes,' approved March 22, 1852, has exceeded, or shall exceed, the amount which the registers and receivers at any such office are entitled to receive under said third section, the surplus which shall remain, after paying the amount so due as aforesaid to said registers and receivers, shall be paid into the Treasury of the United States as other public moneys."

The act of March 3, 1855, (10 Stat., 635,) provides:

"That each register of a land-office and receiver of

public moneys shall receive the same amount of pay for each and every entry of land made under the graduation act of 1854, as such officer is by law entitled to receive for similar entries of land at the minimum of one dollar and twenty-five cents per acre: *Provided*, That the whole amount received per year shall in no case exceed the limitation fixed by existing laws."

By another act of the same date as the preceding act (10 Stat., 701,) it is provided:

"That the registers and receivers of the several land-offices shall be severally authorized to charge and receive for their services, in locating all warrants under the provisions of this act, the same compensation or percentage to which they are entitled by law for the sales of public lands for cash, at the rate of one dollar and twenty-five cents per acre, the said compensation to be paid by the assignees or holders of such warrants."

The general appropriation act of August 18, 1856, (11 Stat., 91,) provides:

"That, in the settlement of the accounts of registers and receivers of the public land-offices, the Secretary of the Interior be authorized to allow, subject to the approval of Congress, such reasonable compensation for additional clerical services and extraordinary expenses incident to said offices as he shall think just and proper, and report to Congress all such cases of allowance at each succeeding session, with estimates of the sum or sums required to pay the same."

The act of March 3, 1853, (10 Stat., 245,) fixes the salaries of registers and receivers in California at $3,000 each, and prohibits them from receiving any percentage of fees, except for deciding pre-emption cases.

The act of July 17, 1854, (10 Stat., 306,) limits the sala-

ries of the registers and receivers of Oregon and Washington Territories each to $2,500 per annum, and office rent, and prohibits them from receiving fees or emoluments of any, except the receivers' necessary expenses for depositing moneys.

The act of July 12, 1858, (11 Stat., 325,) gives the same compensation to registers and receivers in New Mexico which those officers receive in Washington Territory, with a proviso, that their compensation, including fees, shall not exceed $3,000 each per annum.

This is the legislation, by the light of which we are to make up our judgment in this case."

BRIEF.

That Babbitt has no right to retain the sum here sued for, if the same was lawfully collected by him as register of the land-office, this court has already decided. (1 Black, 55.)

The present inquiry is, (1st.) Was it his duty to collect these fees? (2d.) If not, was his failure to pay over a sum which he ought not to have exacted from the locators of land-warrants, a breach of his official bond? (3d.) Can he set up this defense as well as his sureties? (Record, 3, bottom, and 4, top.)

The condition of the bond in suit was "truly and faithfully to discharge all the duties of the said office" of register of the land-office at Kanesville, Iowa. (Record, 3, folio 10.)

I.

The court first divided upon the state of the law regulating a land-register's fees, during Babbitt's term of office, the circuit and district judges placing different

constructions upon the language of the statutes. Of those in force May 9, 1853, when the bond in suit was given, the before-cited act of May 17, 1848, c. 44, (9 Stats., 231,) expressly authorized the register to charge fees to the assignees of warrants issued under the act of February 11, 1847, c. 8, (9 Stats., 123,) so that, after May 17, 1848, the law stood the same as if that provision had been contained in the act of the preceding year.

In like manner, although the act of September 28, 1850, c. 85, (9 Stats., 520,) contained no provision for fees, that of March 22, 1852, c. 19, § 2, (10 Stats., 4,) authorized a charge for locating *all* military bounty-land warrants issued after February 11, 1847, without regard to the services for which they were given or the legislation that directed their issue; and required payment of this fee as well from the original warrantee as from an assignee, thus abolishing the discrimination in favor of the soldier created by the act of May 17, 1848. The appropriation act of March 3, 1853, c. 97, § 1, (10 Stats., 204, middle,) requires that, after the register and receiver have received each $3,000 per annum from fees, "the surplus which shall remain * * shall be paid into the Treasury of the United States *as other public moneys.*" The act of August 4, 1854, c. 244, (10 Stats., 574,) reduced and graduated the price of the public lands, but said nothing about the land-office fees. To rebut any presumption that these were affected by this act of August 4, 1854, the act of March 3, 1855, c. 166, (10 Stats., 635,) declared every register entitled to receive the same fee for entry at the reduced price as if the land had been entered at $1.25 an acre.

The other act on this subject, approved the same day, ch. 207, (10 Stats., 701-2,) giving a quarter-section of

land to almost everybody who, on land or sea, followed the flag, whether with sword, musket, sheath-knife, marline-spike, fife, drum, or team, in any war subsequent to the Revolution, their widows and children, by its sixth section allowed the registers to charge every one, whether the original holder or an assignee, who located any warrant issued under that act the same compensation as for services rendered relative to lands sold at $1.25 an acre, (10 Stats., 702, § 6,) and then the eighth, ninth, and tenth sections extend the provisions and benefits of the act to revolutionary soldiers, their widows and children, together with the chaplains of all wars, and the volunteers who fought at King's Mountain, Plattsburgh, Lewistown, and Nickojack, whether Indians or whites.

From this *résumé*, it seems clear to us that, whether accountable to the United States therefor or not, owing to the doubt arising from the obvious clerical error in the act of March 3, 1853, (10 Stats., 204,) referring to the *third* section of the act of March 22, 1852, (10 Stats., 4,) instead of the *second* section, as must have been intended, the registers were authorized to charge a fee to every locator of a military bounty-land warrant this side of the Rocky Mountains, after the act of March 22, 1852, c. 19, § 2, went into operation. We say "it seems clear *to us*," because the division of opinion in the court below, and the deservedly high reputation of the judge who held the contrary view, indicate that there is room for argument even upon this point, though we are not favored with any opinion showing the course of reasoning which led the distinguished circuit judge to the conclusion at which he arrived.

Authorizing the register to charge these fees was com-

manding him to charge them, where their exaction was one method of obtaining funds to pay the salaries of public officers, and the language indicative of a public policy. (Mason *v.* Fearson, 9 Howard, 259; Thompson *v.* Carroll, 22 Howard, 422; Minor *v.* Mechanics' Bank, 1 Peters, 46; Supervisors *v.* United States, 4 Wall, 435.)

It was not a personal privilege which he could exercise as to one warrant and waive as to another, but a method of collecting the funds wherewith to procure the performance of the duties pertaining to the disposition and settlement of the public lands. The proviso of the act of March 3, 1853, (10 Stats., 204, middle,) speaks of the fees as "the amount received at any land-office, and directs that the surplus above $3,000 be paid into the Treasury like "*other* public moneys."

Of course the sureties are holden for the performance of all those duties which the law threw upon Mr. Babbitt, in his official capacity, during the term for which they guaranteed his faithfulness, as well as for those assumed when he received his commission in April, 1853, though there was no material change; none as to the nature or amount of each several fee, but an increase of grantees by new donations.

II.

Whether it was Mr. Babbitt's *duty* to collect these fees or not, he *did* demand and receive them of those locating military bounty-land warrants through the land-office at Kanesville, Iowa, while he was the register; and he has *not* paid the surplus above $3,000 per annum to the United States.

The question is whether his neglect to put this surplus into the United States Treasury is a breach of the con-

dition of his bond "truly and faithfully to discharge all the duties of the said office;" and upon this the judges of the court below again divided. If it was part of his official duty to collect these fees, then he would be bound to obey the mandatory language of the act of March 3, 1853, chapter 97, § 1, that the surplus "shall be paid into the Treasury of the United States as other public moneys," and disobedience would be unfaithfulness in office. If rightfully received, the line of argument found in the opinion of this court, when this cause was before it in 1861, (1 Black, 61,) precludes the necessity of further discussion of this topic here; and the judgment in that case would then determine the one now to be rendered.

III.

If the exaction of these fees was unauthorized by law and wrongful, would it then be a breach of this bond for Mr. Babbitt to retain them, instead of turning all over $3,000 a year into the Treasury?

This point has not been passed upon by this court; probably because it was not considered that it could arise. Yet it is now presented by the division of opinion thereon in the court below, and we must discuss it.

Rightfully or wrongfully, the fees were, in fact, collected by Mr. Babbitt as register of the land-office at Kanesville, and because he held that position—*virtute officii*, by virtue of an office legally held, and not *colore officii*, under color of a pretended official capacity. The act of locating these warrants was purely an official act. The fees received therefor were paid for official acts, for the performance of which Congress had fixed the entire compensation at $3,000 per annum, payable out of the fees, when they amounted to so much, any surplus to

be paid into the Treasury "as other public moneys" are.

In his recent work on Taxation, page 498, top, Judge Cooley says, of the liability of a public officer for moneys by him collected in that capacity, that "he would not be permitted to rely on technical objections which might be made to the right of the public to the money. If he receives the money to the use of the public, he should [*i. e.*, it is his *official* duty to] account for it; and *it is immaterial that those who have paid it might have successfully resisted its collection from them.*" Neither he nor his sureties have any right to say that, *quoad hoc*, he was not a public officer. The bond in suit was for the faithful discharge of Mr. Babbitt's official duties. *It was a breach of this condition for him to exact illegal and extortionate fees and put them into his own pocket.* (Carlyle *v.* Sharpe, 51 Ill., 71, 72, bottom.)

In Maine, it was held, (Kent, J., delivering the opinion,) that "misconduct in office" is not limited to such acts as the law requires or expressly authorizes, but may be committed by falsely certifying to the state of a record as to which the register was not obliged to give any certificate at all. (State *v.* Leach, 60 Maine, 58, 70, and 71, bottom.) As Judge Cooley observes, "On every principle of right and justice he is precluded from denying his official character under such circumstances." (Cooley on Taxation, 192, and cases cited.) If he seeks to avoid a breach of his bond by saying that the fees were voluntarily paid by the locators of the warrants, then, as these parties could not recover their money so paid from him, he has no excuse for withholding it from the United States. This question has most frequently arisen in suits upon bonds of collectors of taxes, where the de-

fense of illegality of the assessment or collection has been attempted; which is precisely the plea here set up; for the fee paid was one method of taxation; of obtaining funds from the citizens for defraying public expenses.

Speaking of such a defense by a city treasurer, Black, J., said, "Shall he be allowed to assert that a tax is chargeable when he demands it from the citizen, and then say it was not chargeable when the State demands it from him? It seems much more just and reasonable to require that every agent of the commonwealth who receives money for her in the shape of taxes should pay it over, and let the aggrieved party make his appeal to the State herself. Some of these taxes were received more than eleven years ago. Doubtless the persons who paid them have no expectation that they will be refunded. If the treasurer can keep them from the State on the ground that the law did not authorize him to receive them, he will not be obliged to pay them at all. The city has no right to them; the 'Guardians of the poor' is a body which does not exist, and thel oanholders, having acquiesced in their payment for eleven years, are presumed to have yielded their right forever. *But they yielded it to the State for the public benefit and not to the treasurer for his private emolument.*" (Com. *v.* Philadelphia, 27 Penn. St., 501, 502.). In an earlier case in the same State the same doctrine was applied *against the surety* of a collector. (Moore *v.* Allegheny, 18 Penn. St., 55.) In the course of the opinion it is remarked (page 58, near bottom) that, "possessing the right to levy and collect a tax for city purposes from persons and property, *a mistake of the class of persons or the species of property subject to it will not amount to usurpation;*" *i. e.*, will not make their collection an extra-official act.

In a case in Tennessee the court, after mentioning that a collector is not liable for failure to collect on an insufficient warrant, said: "But the rule is very different where the sheriff or collector has actually received public revenue either under an invalid authority, or *without any color of authority*. In such case, neither he *nor his sureties* can be heard to resist a recovery of the money thus received, on the ground of want of proper authority to receive it." (Governor *v.* Montgomery, 2 Swan, 618, citing Same *v.* Scanland, 6 Humph., 195.) In an early case in Maine a collector and his sureties defended upon the ground that the taxes were illegally assessed, and consequently no taxes; that the sums paid by the taxpayers, not being lawfully exacted, constituted no part of the public revenue for which the collector was bound to account. While conceding the invalidity of the assessment, the court denied that this constituted any defense so far as concerned the amount actually received. "For in this action the obligors are all bound by their own bond, sureties as well as principal, for the fidelity of Clough; but the sureties would not be answerable to those from whom he exacted the payment of taxes without legal authority. No facts appear on the report tending to show that they were not all voluntarily paid to the collector; nor have we any ground for presuming that any of those who have paid their taxes to him would ever think of attempting to reclaim the moneys so paid.' (Ford *v.* Clough, 8 Maine, 342.)

In a little later case the same court said: "The collector must then be regarded as having lists of assessments not in legal form put into his hands to collect, and without any warrant for so doing. Yet he has collected portions of the taxes on such lists, and has not paid over

the money to the treasurer. *This money is not his own;* he does not prove that it was received under such a mistake of *fact*, or in such a compulsory manner, that he is obliged to return it to those from whom he received it. The argument is that it might have been so received, but the court can act only upon proof. *The money was collected by him in his official character, and in that character he holds it.*" (Johnson *v.* Goodridge, 15 Maine, 31, 32.)

The supreme court of Massachusetts, in 1860, used similar language, with regard to the official duty of an officer to turn into the public treasury money paid to him upon void warrants, which the parties against whom they ran did not seek to invalidate; "but yielding to their authority, and to that of the deputy sheriff claiming to exercise them under color of his office, they paid the sums demanded of them by him. *This money was received by him, not as a private person*, nor by virtue of any contract or arrangement between him and the collector or tax-payers, *but it came into his hands solely as a deputy sheriff*, claiming authority to act under the power with which he was clothed by law. *In all this he acted officially, not personally, as the deputy of the defendant and not individually.*" (Williamstown *v.* Willis, 15 Gray, 430.) If it be said that, in this case, the taxes were legally collectible, though not by those particular warrants, the answer is that they were not collectible by him who received them; and that, aside from his official position and these void warrants, any other citizen had an equal right to receive them. It is further to be noticed that in the Maine case first cited the assessments, as well as the warrants for their collection, were utterly void. In Maryland, where the principal and *sureties* were sued on such an official bond, and defended upon

the ground of the invalidity of the tax, and not of the precept for their collection, the opinion commences thus: "It is admitted by the demurrer in this case that the collector has received all the taxes levied on the assessable property of Montgomery county, the non-payment of which furnishes the subject of this suit. Having thus admitted the receipt of this money, the collector, who is in the light of an agent of the state, could not be heard to urge in his defence to a suit that the money he had received was on account of taxes which the legislature had no constitutional power to impose." (Waters *v.* State, 1 Gill., 307, 308.) In a cause decided ten years ago the same court say that an action for money had and received or upon the official bond may be maintained by the party entitled to the fund at his election, and add that "the case of Waters and others *v.* The State, (1 Gill., 302,) furnishes a conclusive answer to the objection growing out of the supposed illegality of the tax." (O'Neal *v.* School Commissioners, 27 Md., 240, paragraphs 3 and 4; State *v.* Baltimore and Ohio Railroad Company, 34 Md., 365; Placer Co. *v.* Dickerson, 45 Cal., 12, 14; Sandwich *v.* Fish, 2 Gray, 301; Wendall *v.* Fleming, 8 Gray, 616; Trescott *v.* Moan, 50 Maine, 347; Orono *v.* Wedgewood, 44 Maine, 49.)

The language of Judge Cooley, from whose work most of these citations were obtained, may be employed as most clearly indicating the doctrine they establish. "The principles here stated are applicable not merely to the case of a defect in the official authority, but to the case also in which defects, either technical or substantial, might have been urged to the tax the officer has enforced. The substantial fact is that he has received money for the State, and, having done so, it is

not his privilege to pause and question the right of the State to receive it; but he should pay it over, and leave those from whom it was received to present a claim to the State for the refunding, if they deny its right to retain it." (Cooley on Taxation, 498). At the bottom of the succeeding page, the same author says: "What has been said of the liability of the collector to account for moneys received is as applicable in a suit on any such bond as in a suit for money had and received; he cannot defend by showing that those who voluntarily have paid to him could not legally have been compelled to do so." (*Id.*, 499.)

We will close our argument of this cause with the simple inquiries we should make of a jury. If Mr. Babbitt received these fees as an officer and for the mere performance of his duties as register of the land-office, would it be faithfulness in the discharge of those duties and in that office for him to take these moneys and put them into his own pocket? Or would such fidelity require him to turn them over to the Treasury of the Government in whose behalf (as its officer and agent) he received them? If these funds came into his hands officially during the term covered by this bond, and were by him held in trust for the United States, and their retention was infidelity to his official trust, then his sureties are liable according to the strict letter of their obligation. (United States *v.* Boyd, 15 Peters, 208.)

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